



## **BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.**

### **OPINIONS BELOW.**

The "determinations" by the Commission of the "actual legitimate original cost" of Project 289 were dated October 31, 1933 and September 30, 1937, and the Order of the Commission directing that the disallowed amount of \$601,973.57 be charged to surplus was dated October 31, 1939. They are printed in Vol. II of the record at pages 1000, 1256 and 1293 respectively. The opinion of the Circuit Court of Appeals for the Sixth Circuit (Circuit Judges Hicks, Simons and McAllister) dated June 29, 1942 was written by Judge Simons, and is printed in the record in Vol. III, page 1473, and is reported in 129 Fed. (2d) 126. A petition for rehearing (R., Vol. III, p. 1473) was overruled October 6, 1942 (R., Vol. III, p. 1499).

### **STATEMENT OF JURISDICTION.**

The jurisdiction of this Court is invoked under Sec. 313 (b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. A., Sec. 825 l) and Sec. 240 of the judicial code as amended (43 Stat. 938, Sec. I, 28 U. S. C. A., Sec. 347). The Statutes, the validity of which is involved, are the Federal Power Act of 1935 (49 Stat. 847, 16 U. S. C. A., Sec. 791 (a) ), and the Federal Water Power Act of 1920 (41 Stat. 1077, 16 U. S. C. A. 791-823). The judgment of the Circuit Court of Ap-

peals was entered June 29, 1942 (R., Vol. III, p. 1459) and petition for rehearing was denied October 6, 1942 (R., Vol. III, p. 1499), and this petition is filed within 3 months thereafter.

### **FACTS.**

The facts are as stated in the petition herein *ante* pp. 2-13.

### **SPECIFICATION OF ERRORS.**

The Court below erred:

1. In holding that the Commission had jurisdiction over the Company's accounts and accounting system and also jurisdiction to require the charge to surplus of \$601,973.57.

2. In holding that the 1933 and 1937 Orders could not be reviewed by the Court because appeals therefrom were not taken within the time prescribed by the 1935 Act.

3. In holding that the Company should have known from the 1933 and 1937 Orders that they directed a charge to surplus of the amount disallowed.

4. In holding that the 1939 Order requiring the charge to surplus and which was made without notice or hearing was not violative of the Fifth Amendment.

### **SUMMARY OF ARGUMENT.**

(1) The Commission has no jurisdiction over the Company's accounts and accounting system because Congress limited the Commission's jurisdiction "to those matters which are not subject to regulation by the States," and the Company's accounts and accounting system not only, but its rates, services, securities etc. are being regulated by the Public Service Commission of Kentucky.

(2) The 1933 and 1937 Orders of the Commission were mere "determinations" or "findings" of cost or value and were not appealable until used in the 1939 Order to require a charge to surplus.

(3) The 1939 Order attempting to require that the disallowed amount of \$601,973.57 be charged to surplus was entered without a hearing of any kind on the legality or propriety of the order. It is therefore void because of a denial of due process.

## ARGUMENT.

### POINT I.

**The Commission Has No Jurisdiction Over the Company's Accounts and Accounting System Because Congress Limited the Commission's Jurisdiction "to Those Matters Which Are Not Subject to Regulation by the States," and the Company's Accounts and Accounting System Not Only, but Its Rates, Services, Securities etc. Are Being Regulated by the Public Service Commission of Kentucky.**

In *Kirchbaum v. Walling*, 316 U. S. 517, this Court stated the difficulty that sometimes arises in deciding limits to which Federal legislation vests jurisdiction in the Federal Government and what Congress has left to the States:

(520) " \* \* The judicial task in marking out the extent to which Congress has exercised its constitutional power over commerce is not that of devising an abstract formula. Perhaps in no domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn, under a federal enactment, between what it has taken over for administration by the central Government and what it has left to the States."

(521) " \* \* We cannot, therefore, indulge in the loose assumption that, when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation.  
\* \* \* Congress may choose, as it has chosen fre-

quently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities which, if isolated, are only local."

(522) " \* \* \* The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied."

In the instant case, Congress has stated emphatically the new federal jurisdiction over electric utilities—"such federal regulation, however, to extend only to those matters which are not subject to regulation by the States."

In 1935 Congress passed comprehensive electric utility legislation. It enacted the Public Utility Holding Company Act of 1935 (49 Stat. 803, 16 U. S. C. A., Sec. 79 (a)-79 (r) ) which provided strict regulation and the ultimate elimination of holding companies. Jurisdiction to administer this Act was given to the Securities and Exchange Commission. It also enacted the Federal Power Act. Part I of this Act consisted of Amendments to the 1920 Federal Water Power Act. Among other amendments was the repeal of the section (16 U. S. C. A. 797 (f) ) which had given the Commission jurisdiction to establish a system of accounts for licensees. So that from 1935 to date the Commission has no more jurisdiction over the accounts and accounting system of a licensee than over the accounts and accounting system of an electric utility that does not own a license. As Part II of this 1935 Act Congress gave the Commission certain jurisdiction over electric utility companies regardless of whether they were the owner of a license or not, such jurisdiction however

was limited so as "to extend only to those matters which are not subject to regulation by the States."

The first section of Part II of the 1935 Federal Power Act specifically limiting Federal regulation and consequently the Commission's jurisdiction is as follows:

"Declaration of policy; application of subchapter; definitions. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and the Federal regulation of matters relating to generation to the extent provided in this Part and the Part III next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, *such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States*" (16 U. S. C. A. 824).<sup>2</sup>

The italicized part above is clear and unambiguous. It is not loose language. It was not in the Bill as originally introduced. It will be recalled that there was much publicity regarding the 1935 utility legislation. There were numerous hearings before Congressional Committees. Such hearings are in three volumes comprising more than 2,300 pages.<sup>3</sup>

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<sup>2</sup>Italics supplied throughout.

<sup>3</sup>"Hearings before the Committee on Interstate and Foreign Commerce House of Representatives, Seventy-fourth Congress, First Session on H. R. 5423 to provide for control in the public interest of public utility holding companies using the mails and the facilities of interstate commerce, to regulate the transmission and sale of electric energy and natural gas in interstate and foreign commerce, and for other purposes."

The limitation on the Commission's jurisdiction was inserted by Congress after these hearings at which the proponents of the Bill, including a member of the Commission, the Solicitor of the Commission, a former member of the Commission, the General Counsel of the Committee of the House to investigate Holding Companies and numerous others were unanimous in saying that the purpose of the Bill was (a) to have Federal regulation in the no man's land which the States were unable to regulate, (b) to not interfere with State regulation. The proponents of the Bill said that it was to complement and not supersede State regulation.

Chairman Rayburn, of the House Committee, made this explicit statement in reporting on the Bill (H. R. Rep. No. 1318, 74th Cong., 1st Sess.):

"Under the decision of the Supreme Court of the United States in *Public Utilities Commission v. Attleboro Steam & E. Co.* (273 U. S. 83), the rates charged in interstate wholesale transactions may not be regulated by the States. *Part II gives the Federal Power Commission jurisdiction to regulate these rates* \* \* \* (p. 7).

"The bill takes no authority from State Commissions \* \* \* The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority \* \* \* *Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill*" (p. 8).

Senator Wheeler, who was in charge of the Bill in the Senate, said:

"This bill, unlike many bills which have been proposed in these legislative halls, seeks not for further concentration of power in the hands of the government of the United States; on the contrary, the tendency of the bill is to make these power-holding companies decentralize, so that they can be controlled by local communities, or can be controlled in a small number of states where they carry on their operating facilities" (Vol. 79 of the Congressional Record, 74th Congress, First Session, p. 8384).

"\* \* \* This, as the Senator would know if he had been there, is the statement made by the public utility people. They say: 'The public utility business is a local industry. It ought to be regulated locally;' and I agree with them. It ought to be owned locally, and it ought to be controlled locally, and that is what this bill seeks to have done" (Part 8, Vol. 79, p. 8388).

"\* \* \* We preserve the state regulation completely in the bill, but in title II we made the positive statement that the policy should not be to interfere with state regulation, but to assist and help state regulation" (Part 8, Vol. 79, p. 8775).

Other proponents of the Bill testified before the Committee of the House as follows:

1. Dr. Walter M. W. Splawn, a member of the Interstate Commerce Commission and General Counsel of the Committee of the House of Representatives to investigate holding companies:

"These interregional holding companies have undertaken to tie a number of local or regional activities and operations into one top control. That

is to say, this is an industry which is essentially local and which should be regulated, should be managed, locally, and therefore regulated locally. That is, by the municipalities and by the States" (Hearings, p. 180).

"You understand, as the Federal Trade Commission pointed out to try to reach all of those abuses, you will have about 32 different bills or different sorts of approach and your constituents will be asking you to go into the regulation of the abuses, whereas with local regulation of operations and the elimination of holding companies the abuses would disappear. I believe that the regulation of the rates and the issuance of securities and *policing of the accounts* and fixing of valuations of these properties should be by the States and by the municipalities, because their activities are local" (Hearings, p. 180).

"Mr. Cooper: Doctor, you are satisfied that about 90 per cent of this field of public utilities is intrastate?

"Commissioner Splawn: To be more accurate, about 83 per cent.

"Mr. Cooper: Well, why can't they be regulated by State commissions?

"Commissioner Splawn: I think that is where it should be regulated, Mr. Cooper.

"Mr. Cooper: I agree with you on that. Does this bill provide for State regulation—I must confess that I have not gone over it very carefully.

"Commissioner Splawn: This bill, if you pass it, will turn these regulations right back to the States. \* \* \*" (Hearings, pp. 184, 185).

"Mr. Cooper: Doctor, you believe then that the States should regulate this industry?

"Commissioner Splawn: I believe they should.  
\* \* \*" (Hearings, p. 186).

2. Hon. Robert E. Healy, a member of the Securities and Exchange Commission and a former member of the Federal Power Commission (Hearings, p. 121):

"Mr. Merritt: Dr. Splawn said a number of times that he favored companies which were locally directed, by local public authorities, and not from a central body.

"Now, these integrated companies you have been speaking of, I take it, would be operated under the authority of the States in which they operate and not from Washington.

"Commissioner Healy: I take it so.

"Mr. Merritt: Or supervised rather.

"Commissioner Healy: Yes." (Hearings, p. 371.)

3. Hon. Clyde L. Seavey, then and now a member of the Federal Power Commission (Hearings, p. 384):

"Those are the two primary immediate objectives of the act.

"These purposes and objectives are to be accomplished in the following way: First, by putting into action the authority of the Federal Government in a regulation which is not now carried out by the Federal Government; secondly, by supplementing of the State authorities, with the Federal authority without impinging upon the proper functions of the State authorities, and, thirdly, the coordination of the Federal and State authorities so that the full force of a complete regulation may be exerted" (Hearings, p. 391).

"As I have indicated, it is the purpose of this bill that the Federal Power Commission will assume only jurisdiction over the interstate wholesale business of these companies. I think I have already made that plain" (Hearings, p. 402).

4. Hon. Dozier DeVane, at that time Solicitor, Federal Power Commission (Hearings, p. 449):

"Mr. DeVane: There has been considerable discussion here as to what is the purpose of this legislation and the effect it will have upon States and upon State regulation, and in that connection, I wish to say that in the instruction to its representatives that participated in the preparation of this legislation, the Federal Power Commission directed that what it desired to recommend to Congress was legislation that would complement and not supersede State regulation.

"Our specific instructions, from our Commission, was to preserve to the fullest extent State regulation and to draw a law that would complement that regulation as far as Congress could go (Hearings, p. 495).

"I next wish to call your attention to Section 217, page 122. Notwithstanding the attempt so far as possible to make it clear that the bill does not usurp State authority, we added Section 217, which specifically declares that nothing in this title shall be construed to impair or diminish the power of any State commission.

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"Now, all of those provisions, when you analyze them, are complements to State regulation and in no way supersede State regulation" (Hearings, p. 519).

“Mr. Bulwinkle: The reason I asked, Mr. DeVane, I notice in the papers that the Georgia Utilities Commission announced that they were coming to Washington to fight this bill.

“Mr. Chairman: Yes; on the theory that it was taking away from them some of their jurisdiction; not on any other theory, because I think I have talked with practically every Congressman from Georgia or every one of them has talked to me about it, and upon being assured that this bill did not take jurisdiction away from their commission, they seemed to be perfectly satisfied.

“Mr. DeVane: Due to the error that occurred in subsection 201(a) there was plenty of justification for the effort that has been made to convince State commissions that it was the purpose of this bill to take power away from them, and that representation could be fairly made to them, and since the bill has been introduced, I have heard it stated that was the concealed purpose of this commission, and probably might be the intention of Congress; but I want to make it perfectly clear here that it is not the purpose or desire of the Commission, and we trust that when the legislation comes out of Congress that it will leave to the State commissions as much authority as can be left with them.

“The Chairman: And you want the act to be perfectly clear on that point.

“Mr. DeVane: I want the act to be perfectly clear on that point” (Hearings, p. 529).

5. Hon. David E. Lilienthal, Director, Tennessee Valley Authority (Hearings, p. 2062), testified:

"Mr. Cooper: You think then that the Federal Government ought to supplant the State commissions in regulation of utilities?

"Mr. Lilienthal: Oh, no" (Hearings, p. 2062).

6. Hon. H. Lester Hooker, Chairman Legislative Committee National Association of Railroad and Utility Commissioners (Hearings, p. 1605), testified:

"It has been repeatedly stated, by all of the representatives of the proponents of this bill who have appeared before this committee, that the avowed purpose of this legislation is merely a 'supplement,' or to 'fill in a gap' in State regulation, and not to supplant, supersede, or duplicate the regulation within the power of the States in any respect. It has been stated time and again by the proponents that it is their desire to leave unaffected and unimpaired the entire field to the maximum extent to which the States may be able to deal with this matter \* \* \*" (Hearings, p. 1611).

7. Senator Burton K. Wheeler, Chairman of the Senate Committee, considering the Bill stated to his committee:

"The Chairman: I do not think there is any intention to break down the local regulatory bodies. On the contrary, I think the drafters of the bill intended to strengthen the State commissions" (Senate Hearings, p. 764).

8. Senator Shipstead, Part 8, Vol. 79, p. 8395.

"\* \* \* but I desire to say to the Senator from New Jersey (Mr. Barbour) that the thought

of the committee was not to interfere within a state, but to leave all utilities within a State to be regulated by a state commission. \* \* \*

9. Senator Woodrum, Vol. 79, Part 9, p. 10574.

“It has been repeatedly stated by sponsors of this legislation—and I mean by ‘this legislation’ either the committee amendment or the Senate bill—that the bill is not intended to interfere with the right of any state to regulate business within its borders, but simply to supplement state regulation where it is necessary. In fact, it is stated in this declaration of policy in part II of the act that its purpose is to extend only to those matters which are not subject to regulation by the states.”

Since Petitioner’s accounts and accounting system are actually being regulated by the State of Kentucky, we submit that the Commission has no jurisdiction over them.

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The Court below held that the Company’s accounts and accounting system were subject to the jurisdiction of the Federal Commission, and suggested that such accounts and accounting system might also be subject to State jurisdiction. This is unthinkable. You cannot have dual control of a system of accounts any more than you can have dual control of the steering wheel of an automobile. The present case affords a perfect example, *i. e.*, it was alleged in the verified Response to the order to show cause, in the Petition for Rehearing to the Commission and in the petition in

the Court below, and no where denied, that under the system of accounts and rules and regulations of the Kentucky Commission, the Company is required to keep the \$601,973.57 in its electric plant account, and to not charge it to surplus. The Kentucky Commission's Order of September 16, 1941, issued pursuant to the reclassification of property in accordance with the provisions of the uniform system of accounts specifically required the Company to classify the \$601,973.57 to its Electric Plant account, as part of its cost of the property. The Federal Commission's 1939 Order is directly to the contrary. The Company cannot serve two masters giving contrary orders anymore than an individual can serve both "God and Mammon."

The question of the jurisdiction of the Federal Commission over an electric utility company's accounts and accounting system is not only important to this Company, but to every other electric utility.

The Court below held that Section 301 (a) of the 1935 Act (16 U. S. C. A. 825) gave the Commission jurisdiction over the Company's accounts and accounting system. The language in this section is general, and does not specifically limit such jurisdiction to companies whose systems of accounts are not subject to State regulation. However, this general language does not broaden the specific language in the first section of the Act copied above. Each time the Act speaks on a subject it does not repeat the limits in Part II of the Act copied above that "such Federal regulation however to extend only to those matters which are not subject to regulation by the States." For instance, Sec-

tion 209 of the Act (16 U. S. C. A. 824 (e) (a) ), with reference to the all important subject of rates, is also general and does not limit such jurisdiction to interstate rates; however, Commissioner Seavey of the Commission and Senator Wheeler, both, said that regardless of general language it must be understood that the jurisdiction extended only to interstate matters which could not be regulated by the States.

Part 8, Vol. 79, p. 8431:

"Mr. Borah: I understand that it is not the intention of the framers and proponents of the measure to deal with intrastate matters at all.

"Mr. Wheeler: That is correct.

"Mr. Borah: If the general language used could be construed as dealing with intrastate matters, nevertheless the intention is to confine the operation of the bill to interstate matters?

"Mr. Wheeler: That is entirely correct (Part 8, Vol. 79, p. 8431).

"Mr. Merritt: Returning for a moment to section 209—

"Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rules, regulations, practices, facilities, or service—

"And so forth.

"That does not say anything about interstate commerce; but is that inferred?

"Commissioner Seavey: Yes; the jurisdiction only goes to interstate and if there is any doubt about that, language should be put in there; but it is believed that covers it" (Hearings, p. 410).

"The Chairman: Then could there be any good reason why there should not be some authority that would control that the States cannot control?"

"Commissioner Seavey: I do not know of any reason why.

"The Chairman: And is not that what you are talking about?"

"Commissioner Seavey: That is what I am talking about.

"The Chairman: And that you are driving at here by this law, whatever the language, to control that part of this business that the States themselves cannot control and that the States themselves would not control, in order that it might help them control the things that are in their States?"

"Commissioner Seavey: That is true.

"The Chairman: And that is what you are offering here as an amendment to the present law.

"Commissioner Seavey: Yes" (Hearings, p. 427).

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From the above it is submitted that the Commission does not have jurisdiction over the Company's accounts and accounting system nor jurisdiction to require it to charge the \$601,973.57 to surplus. This money was actually and in good faith spent on the Project. Securities representing these dollars are outstanding in the hands of the public. The actual cost of the Project should remain in the Company's accounts and not be taken out of such accounts by a charge to surplus. What part of the original cost of the Project the Public Service Commission of Kentucky may allow in rates, se-

curities to be issued, etc., is another matter and within the discretion of that Commission; likewise what part of such original cost the Federal Power Commission may allow in amortization reserves, etc., is another matter and within the discretion of that Commission.

This question got off to a bad start, *i. e.*, the Seventh Circuit Court of Appeals in *Northern States Power Company v. Federal Power Commission*, 118 F. (2d) 144, and the Court of Appeals for the District of Columbia in *Alabama Power Company v. Federal Power Commission*, 128 F. (2d) 280, have held that the Commission had jurisdiction over electric utility accounts and accounting systems; however, neither of these courts considered or at least they did not refer to the Congressional enactment that Federal regulation was limited to "those matters which are not subject to regulation by the States," nor did they refer to the testimony copied above by proponents of the 1935 Federal Power Act that it was the purpose of the Act to regulate what the States could not regulate and to complement and not supersede State regulation.<sup>4</sup>

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<sup>4</sup>Since writing this brief we have read a copy of the opinion of the Second Circuit Court of Appeals rendered November 25, 1942 in the case of *Hartford Electric Company v. Federal Power Commission*. (Not yet officially reported.)

## POINT II.

**The 1933 and 1937 Orders of the Commission Were Mere "Determinations" or "Findings" of Cost or Value, and Were Not Appealable Until Used in the 1939 Order to Require a Charge to Surplus.**

The Court below erroneously dismissed the appeal in so far as it applied to the 1933 and 1937 Orders on the ground that the Company should have known that these Orders required a charge to surplus; that the Orders therefore adversely affected the Company and that appeals should have been, but were not taken from such Orders within the time prescribed by Sections 313 (a) (b) of the 1935 Act (16 U. S. C. A. 825 l).

Both the 1933 and the 1937 Orders were and were styled mere "determinations" of the "actual legitimate original cost" of Project 289. They can be searched from stem to stern, and there will not be found in them one word of direction to the Company to do other than make a mere bookkeeping entry of the Commission's "determination." They were nothing but determinations of cost or value to be used subsequently by the Commission in matters as to which the Commission had jurisdiction, *i. e.*, amortization reserves, purchase or recapture by the Government, compensation for emergency taking over, etc. In *United States v. Los Angeles R. R. Co.*, 273 U. S. 299, this Court in an opinion by Mr. Justice Brandeis held that an order of the Interstate Commerce Commission making a "finding" or "determination" of value was not reviewable by the Court unless and until such "determi-

nation" or "finding" was subsequently used to the Company's detriment.

(p. 309) "The final report on value, like the tentative report, is called an order. But there are many orders of the Commission which are not judicially reviewable under the provision now incorporated in the Urgent Deficiencies Act. \* \* \*

*"The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation. Compare Smith v. Interstate Commerce Commission, 245 U. S. 33. Moreover, the investigation made was not a step in a pending proceeding in which an order of the character of those held to be judicially reviewable could be entered later. It was merely preparation for possible action in some proceeding which may be instituted in the future—preparation deemed by Congress necessary to enable the Commission to perform adequately its duties, if and when occasion for action shall arise."*

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(p. 314) "No basis is laid for relief under the general equity powers. The investigation was undertaken in aid of the legislative purpose of regulation. In conducting the investigation, and in making the report, the Commission performed a service specifically delegated and prescribed by Congress. Its conclusions, if erroneous in law, may be disregarded. But neither its utterances, nor its processes of reasoning, as distinguished from its acts, are a subject for injunction. \* \* \*"

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The decision of the Court below is in direct conflict with the above decision by this Court. It is also in conflict with this Court's decisions in *State Corporation Commission of Kansas v. Wichita Gas Company*, 290 U. S. 561; *Rochester Telephone Corporation v. United States, et al.*, 307 U. S. 125; *Federal Power Commission v. Pacific Power & Light Co.*, 307 U. S. 156, as to the reviewability of orders of a regulatory body.

In addition, it was shown to the Court below that the then Commission composed of a different personnel and staff was publicly contending as we are contending, *i. e.*, that similar orders of the Commission making "determinations" of the "actual legitimate original cost" of licensed projects were not reviewable by the Courts unless and until they were subsequently used to the licensee's detriment.

As was shown to the Court below (R., Vol. III, p. 1474) the writer was first employed in this case immediately after the 1937 order, and his opinion was asked as to whether or not an appeal could then be

taken to the Court. The writer reviewed all of the authorities that could be found on the subject, and in a written opinion advised the client that no appeal could then be taken. At that time all of the cases and the Federal Power Commission itself were in agreement with this opinion. The opinion letter shows the following quotation from the case of *Clarion River Power Co. v. Smith, et al.*, 59 F. (2d) 861:

p. 863. “\* \* \* It is, we think, apparent that, if the commission is intelligently to exercise such extensive regulatory and supervisory powers, the authority to determine the net investment of any project is absolutely necessary. *Such a determination is purely administrative* in character, and is not to be confused with the judicial determination which takes place for another purpose at the end of the license period. \* \* \*”

Also the following quotation from *Alabama Power Co. v. Smith, et al.*, decided by the Supreme Court of the District of Columbia July 17, 1935: (This is an unpublished opinion and we cannot even locate it now, but the letter to the client shows that it was found in Commerce Clearing House Public Utilities and Carrier Service, Sec. 17033.)

“That the Commission has the power to investigate the cost of the plaintiff's project is settled by the case of *Clarion River Power Co. v. Smith*, 59 Fed. (2d) 861. It would be a futile act to make the investigation and no finding based upon it. *This finding is an administrative and not a judicial act, and does not bind the plaintiff.*”

The letter also referred to the cases of *State Corporation Commission of Kansas, et al., v. Wichita Gas Company*, 290 U. S. 561 and 562, and *United States v. Los Angeles R. R. Company*, 273 U. S. 299.

In addition, before giving our written opinion, we found that the then Commission and its then staff were also of this opinion. That is, we found from the case of the *Clarion River Power Company v. Smith, et al.*, 59 F. (2d) 861, referred to above that Mr. William Marshall Bullitt, an attorney of Louisville (presently, one of the writer's partners), was attorney for the Clarion Company. Being anxious to get everything available on the subject, we secured from Mr. Bullitt his entire record in the case. It showed that the opinion reported in 59 F. (2d) 861 was an appeal of a case that had been filed in the Supreme Court of the District of Columbia by the Clarion Company against Patrick J. Hurley and other members of the Federal Power Commission (Equity No. 52024). (This District of Columbia case is referred to in the opinion below as being reported in 59 Wash. Law Rep. 106.) The record showed that the Clarion River Company was the owner of a licensed project, that it had submitted its statement of "actual legitimate original cost"; that the Commission's Staff had recommended the disallowance of \$11,000,000; that the Commission had set the case for hearing but that the Clarion River Company a few days prior thereto filed the above suit, asking that the Commission be enjoined from holding the hearings or from making any adjudication of the cost of the project. The record shows that the case

was heard before the Court on December 8, 1930, on the Clarion Company's motion for a temporary injunction and on the Commission's Motion to Dismiss. The printed "Transcript of Proceedings on Motion to Dismiss" showed that Mr. Charles A. Russell, the then attorney for the Commission argued that if as a result of the proposed hearing the Commission made an order identical with our 1933 and 1937 orders, *i. e.*, determining costs, eliminating certain claimed amounts and directing that the Commission's action be entered on the Company's books that even then under the decision of this Court in the *Los Angeles R. R. Case*, 273 U. S. 299, referred to above, he did not think an appeal would lie from such an order. Mr. Russell stated:

(p. 30) "Mr. Russell: Order it then as the final net investment.

"The Court: Then there would be a final order?

"Mr. Russell: Then there would be a final order on that, but even when we come to that, your Honor, I am satisfied that final order is not reviewable in the face of this decision of the Interstate Commerce Commission."

(p. 31) "\* \* \* But notwithstanding that, I say that under this decision that until we make an order that affects some right—and what that right is is going to be for the Court to ultimately determine—whether on a bare order that they shall enter that in their books as the net investment I am not prepared to say, but I have serious doubts that that is an order that can be reviewed; but if, after making the order that we do require them to enter it in the books, we then undertake to

regulate the rates, or we undertake to recover excess earnings, or regulate the issuance of securities, the moment that we use that finding as a basis to compel them to do something with reference to rates, that would be in the nature of due process of law, I am rather fearful the Court would not have any jurisdiction, although I may be mistaken. \* \* \*

Of course, Mr. Russell would not have made the above argument if the Commission or its staff had thought that the Order meant that the disallowed amount of \$11,000,000 should be charged to surplus.

The opinion of the Court below is in error in saying that we "had already been advised of a judicial determination in Clarion River Power Company v. Hurley, *supra*; that the scope of the Commission's authority included power to direct that disallowed items of cost should not be retained in the capital accounts." Respectfully, we submit that this Clarion River case did not so advise us because the suit was to prevent a hearing as to what, if any, items should be disallowed. The Commission had made no order in the premises, and it argued that the order that it would make would not even be an appealable order.

As will be shown hereafter at page 43, the Commission used the Clarion River Power Company case as authority for its argument that an order making a "determination" of "actual legitimate original cost" was "purely administrative in character," and could not be appealed to the Court.

The opinion below refers to *Alabama Power Company v. McNinch*, 94 F. (2d) 601 (App. D. C.). The Alabama opinion was not published until after January 6, 1938, and so we did not have the benefit of it when we gave our opinion as to the 1937 Order. However, subsequent investigation of the Alabama case shows again that the then Commission and its then staff argued extensively that an Order of the Commission identical with our 1933 and 1937 Orders were not appealable because such an order did not hurt the owner of the license.

The reported opinion in the Alabama Power Company (94 F. (2d) 601, 604) case shows that the Commission Order therein involved was identical with the Commission's 1933 and 1937 Orders in our case regarding the bookkeeping entry, *i. e.*, it directed as in our case:

“\* \* \* the Power Company to establish accounts showing the actual legitimate original cost of a hydro-electric project owned by the Power Company to be the sum determined by the Commission as such cost, and requiring the Power Company to establish and maintain subsidiary accounts and records to substantiate all entries making up such total cost.”

The record in the Alabama Power Company case shows that on June 26, 1933, the Federal Power Commission filed a motion to dismiss in the Supreme Court of the District of Columbia and, among other reasons, stated:

"4. That action on the part of the defendants complained of does not involve a final order of the Federal Power Commission and cannot be reviewed by the Courts."

The Commission's brief on the Motion to Dismiss, filed November 3, 1933, states:

"The decision and orders involved were administrative determinations and not to be confused with the later determinations which would be subject to judicial review (*Clarion River Power Company v. Smith, et al.*, 59 Fed. (2d) 861): there can be no deprivation of any right or property of the plaintiff at this time; and a full, complete, and adequate remedy is open to this plaintiff to test the validity of the Commission's decision and orders if and when they should be used."

p. 10. " \* \* \* A similar opportunity would be afforded this plaintiff for presentation of every contention made in the bill of complaint if and when the Federal Power Commission should seek, under the provisions of Section 26 of the Act, to compel compliance with its order or accomplish revocation of plaintiff's license; or should seek, under Section 19 and 20, to regulate the rates or control the security issues of plaintiff, or, under the provisions of Section 10 (d), should require establishment by plaintiff of amortization reserves; or under the provisions of Section 14, should undertake to recapture the licensed property. Since none of these measures can be attempted at this time, the present action is premature and when the Commission proceeds under the Act an adequate remedy is available to plaintiff."

The Federal Power Commission filed its brief on June 11, 1935, "In support of defendant's answer," and said:

**"The Jurisdiction of this Court.**

(p. 4) "Defendants are content to accept this court's decision overruling their motion to dismiss the bill; they are willing and ready to meet plaintiff's case on its merits. However, a decision of the Supreme Court which was handed down only ten days after this court overruled the defendants' motion in the case at bar strengthens our former doubt as to this court's jurisdiction. We therefore regard it as our duty to this court to renew the motion to dismiss on the ground that plaintiff has suffered no real injury from the order in question, and to discuss briefly the authorities that lead us to this conclusion. The decision referred to is *State Corporation Commission of Kansas v. Wichita Gas Co.*, 290 U. S. 561, decided January 8, 1934. \* \* \*

"A determination by the Federal Power Commission such as that involved in the present case has been described by the Court of Appeals of the District of Columbia as 'purely administrative in character, and \* \* \* not to be confused with the judicial determination which takes place for another purpose at the end of the license period.' *Clarion River Power Co. v. Smith*, 59 F. (2d) 861, 863. The order involved in the *Wichita* case was described by the Supreme Court as 'legislative in character'; 'The Commission's decisions upon the matters covered by it cannot be *res adjudicata* when challenged in a confiscation case or other

suit involving their validity or the validity of any rate depending upon them.' (290 U. S. at 569.) The parallel between the two cases is clear.

"The question now presented thus narrows down to that of the Commission's authority to issue the purely administrative order requiring the company to set up on its accounts the figure which the Commission has determined to be the actual legitimate original cost of its property under license. In deciding that question, this Court is not to decide whether the cost figure found by the Commission may legally be employed as the basis for recapture, security issues, or rate making."

Of course, the above negatives any claim that the Commission which issued the orders thought that the orders carried a direction that the disallowed amount be charged to surplus. We are certain that the then Commission and its then staff was sincere in contending just as we are contending that Orders making a "determination" of the cost of a licensed project did not carry any direction or implication that the disallowed amount should be charged to surplus. Our objection is that the decision of the Court below denies us a judicial review of the 1933 and 1937 Orders because of the Court's opinion that we should have known what the then Commission and its then staff who made the Orders did not know, *i. e.*, that the Orders carried a direction of a charge to surplus.

The Commission's "show cause" order of April 4, 1939, was the first intimation from the Commission that it thought the disallowed amount should be charged to

surplus. Up until 1939, or for a period of nineteen years, the Commission had never theretofore claimed that the disallowed amount should be charged to surplus. This is a "powerful indication" that the Commission had no authority to make such an order.

*Federal Trade Commission v. Bunte Brothers*, 312 U. S. 349.

(p. 351) "That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. \* \* \*"

We ascribe perfect sincerity to the present Commission and its present Staff. Our point is that neither the present Commission nor the Court should penalize us for thinking as did the then Commission and its then Staff.

We submit that the Order of the Court below was erroneous in dismissing the appeal as to the 1933 and 1937 Orders.

## POINT III.

**The 1939 Order Attempting to Require that the Disallowed Amount of \$601,973.57 be Charged to Surplus Was Entered Without a Hearing of Any Kind on the Legality or Propriety of the Order. It Is Therefore Void Because of a Denial of Due Process.**

The hearings prior to the 1933 and 1937 Orders related solely to the question of what was and what was not "actual legitimate original cost." There is not one syllable of testimony or a line of brief or argument on either side to put the Company on notice that any amount that the Commission disallowed should be charged to surplus. The Kentucky Commission's system of accounts and its specific order of September 16, 1941, require that the \$601,973.57 should be kept in the electric Company's account and not charged to surplus. There is nothing in the Federal Commission's system of accounts which would require that the disallowed amount should be charged to surplus. In the case of *Northern States Power Company v. Federal Power Commission*, 118 F. (2d) 141 (C. C. A. 7), Mr. Charles W. Smith, Chief of the Commission's Bureau, Accounts, Finance and Rates, and an eminent authority thus testified on September 26, 1939, as to the devious, dubious and doubtful reasoning from which the present Commission contends that its system of accounts requires the charge of disallowed amounts to surplus!

"Q. Is such treatment required in the Federal Power Commission's uniform system of accounts?

"A. I believe so.

"Q. Will you refer to the Commission's Uniform System of Accounts and indicate the instructions and accounts provided for this depreciation?

"A. I refer particularly to General Instruction 2-F appearing on page 9 of the Commission's uniform System of Accounts. That instruction reads as follows: 'All charges to the accounts prescribed in this system for electric plants, income, operating revenues, and operating expenses shall be just and reasonable, and no payments by the utility in excess of just and reasonable charges shall be included in account 538, "Miscellaneous Income Deductions."'

"Miscellaneous Income Deductions is an account for the transactions of the current year. Thus where in a system of accounts we find that the delayed items, that is items that relate to the past years instead of going into account 538 and then to surplus go to surplus direct. There is no difference in the principle involved in this matter.

"Q. As to unjust and unreasonable items which occurred in the previous year, is the account to which such unjust and unreasonable items are chargeable, account 414, which is shown on page 86 of the System of Accounts?

"A. That is right. The item should be charged to account 414, Miscellaneous Debits to Surplus. Of course, charges to the income account all go to surplus. The income account, however, is for the current year, and where you have large items which relate to past years, the preferable principle is to charge those items directly to surplus rather than indirectly to account 538. The final resting place, of course, is the same in both cases.

"But to continue the answer to your question as to other provisions of the System of Accounts, I would like to call your attention to the instruction on page 3 under the heading 'Applicability of System of Accounts,' and particularly to the last paragraph of that statement:

" 'In accordance with the requirements of section 3 of the Act, the classification "Investment in Road and Equipment of Steam Roads, Issue of 1914, Interstate Commerce Commission," is published and promulgated as a part of the accounting rules and regulations of the Commission, and a copy thereof is appended hereto as Appendix II. Irrespective of any rules and regulations contained in this system of accounts, the cost of original projects licensed under the Act, and also the cost of additions thereto and betterments thereof, shall be determined under the rules and principles as defined and interpreted in said classification of the Interstate Commerce Commission so far as applicable.'

"I would like to call your attention also to General Instruction No. 9, appearing on page 10 of the Uniform System of Accounts, and the instruction provides that separate accounts must be kept to show the actual legitimate cost of each project, and the cost of operating each project."

Half of this Company's surplus should not be taken away from it on such thin and arbitrary accounting reasoning and without any hearing thereon. This is so in conflict with the decisions of this Court on the requisites of due process that we merely mention the

cases of *Morgan, et al., v. United States*, 304 U. S. 1, 18; *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292, 304.

### CONCLUSION.

WHEREFORE, Petitioner submits that the petition herein should be granted because the final determination by this Court of the questions of law involved in this case is of utmost importance to the Company not only, but to electric companies generally in the matter of settlement of State and Federal jurisdiction over such company's accounts and accounting system.

The petition for a writ of certiorari should be granted and the decision of the Court below set aside.

Respectfully submitted,

CHARLES W. MILNER,  
*Attorney for Petitioner,*  
 Kentucky Home Life Bldg.,  
 Louisville, Kentucky.

A. LOUIS FLYNN,  
 HELMER HANSEN,  
 231 South LaSalle St.,  
 Chicago, Illinois,

BULLITT & MIDDLETON,  
 Kentucky Home Life Bldg.,  
 Louisville, Kentucky,  
*Of Counsel.*

